U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 October 2002

In the Matter of:

KENNETH H. PLEASANT,
Claimant,

v.

WESTMORELAND COAL COMPANY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

CASE NO: 1999-BLA-1137

Appearances:

Joseph E. Wolfe, Esq
For the Claimant

Douglas A. Smoot, Esq.
For the Employer

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

Statement of the Case

This proceeding involves a request for modification of the denial of a duplicate or subsequent claim for benefits under the Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901 et seq. ("the

Act"), and the regulations promulgated thereunder.[1] Since this claim was originally filed in 1996, which is after March 31, 1980, Part 718 applies. §718.2 Because the Claimant Miner was last employed in the coal industry in West Virginia, the law of the United States Court of Appeals for the Fourth Circuit controls. (D-1, 2, 3) *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Procedural History

Claimant's initial claim for black lung benefits was filed on July 5, 1988. (D-67-1) The District Director denied the claim on the grounds that Claimant had not proved the existence of pneumoconiosis, its causation at least in part by coal mine work, or total disability caused by the disease. (D-67-13) On December 16, 1988, Claimant requested a formal hearing, and the case was referred to the Office of Administrative Law Judges on March 14, 1989. (D-67-16, 23) Following submission of additional evidence and a formal hearing on June 5, 1990, Judge Rosenzweig denied the claim on June 28, 1991, because Claimant had not established the existence of pneumoconiosis.(D-67-39) That claim was not appealed and became final. (D-30)

The instant claim was filed on October 11, 1996. It was denied by the District Director on January 16, 1997, because Claimant had not proved the existence of pneumoconiosis, a causal relation with coal mine work, total disability caused by pneumoconiosis, or a material change in conditions since the prior denial. (D-19) Claimant appealed, requesting a formal hearing by letter dated January 29, 1997. (D-21) The claim was referred to the Office of Administrative Law Judges for hearing on June 12, 1997. (D-29, 30) Judge Murty denied the claim on June 30, 1998, finding that Claimant had not established a material change in conditions with respect to the second or "duplicate" claim, because he had not established the existence of pneumoconiosis. (D-48) Claimant filed a timely request for modification on January 5, 1999, together with a positive interpretation by Dr. Cappiello, of an x-ray taken July 22, 1998, the results of a pulmonary evaluation performed August 17, 1998, by Dr. Smiddy, and the results of pulmonary function tests administered on July 22, 1998, by St. Mary's Hospital in Norton, Virginia. The request for modification asserted that the medical evidence tends to prove that Claimant has coal workers' pneumoconiosis, and is disabled from a respiratory impairment due to pneumoconiosis. However, the claim did not explicitly declare whether a change in conditions or a mistake in a determination of fact was being asserted. The claim that Claimant has pneumoconiosis and is totally disabled thereby was denied by the District Director on April 2, 1999, on the grounds that the evidence showed neither a change in condition since the prior decision, nor a mistake in making the prior decision. The District Director noted that, although the arterial blood gas test met disability standards, the evidence in the file did not indicate that the test

[1]All applicable regulations which are cited are included in Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Director's Exhibits are denoted "D-"; Employer's Exhibits are denoted "E-"; and citations to the hearing transcript of January 9, 2001, are denoted "Tr." Since the claim was pending on the effective date, January 19, 2001, of the December 20, 2000, amendments to Parts 718 and 725, consideration of the claim is governed by the amendments in accordance with their terms.

result was caused by pneumoconiosis. (D-61) Claimant requested a formal hearing. (D-62, 64) The claim was referred to the Office of Administrative Law Judges on July 21, 1999, and a hearing was conducted by this tribunal on January 9, 2001, in Abingdon, Virginia. (D-68, 69) Employer and Claimant were represented by counsel. The Director was not represented. The findings and conclusions made by this tribunal are based upon an analysis of the entire record, together with applicable statutes, regulations, and case law, in relation to those issues which remain in substantial.

Issues

1. Whether Claimant has established a change in conditions since Judge Murty's denial of his claim on June 30, 1998, or a mistake in a determination of fact in the pertinent record?

2. Whether a medical report submitted by Dr. Castle is admissible in evidence or may be deemed probative if certain testing in connection therewith was by a technician allegedly not licensed as required in Virginia?

3. Whether Claimant has established the existence of coal workers' pneumoconiosis?

4. Whether, if so, Claimant has established that such pneumoconiosis was due to his coal mine employment?

5. Whether Claimant is totally disabled?

6. Whether such total disability, if proved, is due to coal workers' pneumoconiosis?

7. Whether the amended Federal Black Lung regulations are applicable to this claim?

Findings of Fact

Claimant's Objection to Certain Evidence Based on State Licensing Requirements

Claimant objected to certain medical evidence at issue in this proceeding as allegedly procured in violation of state licensing requirements. The issue was first raised before Judge Jansen, because of the unavailability for cross-examination of a medical technician, Roderick Pritchard, who had administered pulmonary function and arterial blood gas tests allegedly in violation of Virginia state licensing requirements in connection with Dr. Castle's examination and report of November 28, 1997. (D-37, 44) Dr. Castle's opinion and related medical test results had been considered previously by Judge Murty in relation to his denial of the claim issued June 30, 1998. (D-48)

At the hearing before this tribunal on January 9, 2001, Claimant again objected to the introduction into evidence of Dr. Castle's report, and urged in the alternative that no weight should be given to it, suggesting with a citation to *Maggard v. Dominion Coal Co.*, 1999-BLA-0133 (Jul. 10, 2000), that for the Department of Labor to condone or "to give weight to a report wherein

someone has not been licensed" would be against public policy. Claimant also seems to have contended that the inability to cross-examine the technician would be a denial of due process, and that other reports might be tainted by the alleged defect. (Tr. 7-11, 23-24, 27) Claimant's counsel asserted that when subpoenaed on several prior occasions to testify in black lung hearings Pritchard had invoked the Fifth Amendment; that there was a statement by his attorney filed in the record to the effect that Pritchard would continue to take the Fifth Amendment while a criminal case was pending against him; and that the criminal case against him was still pending.

Before this tribunal Employer asserted that the issue had been previously addressed dispositively by Judge Jansen in a order issued February 3, 2000, and that there had been no subpoena request to require Pritchard's testimony at the hearing on January 9, 2001. Employer also noted that the medical examination in question had been done in connection with the earlier claim; that it had been relied upon by a previous Administrative Law Judge in denying benefits; and that the current case was a modification claim and involved no new or subsequent examination by Dr. Castle. Employer also contended that the study in question had been validated by Dr. Castle and other pulmonary specialists, and that, to the extent that a mistake of law, rather than a mistake in a determination of fact, was involved, it would not be properly considered pursuant to the request for modification. (Tr. 11-13, 16) This tribunal deferred a ruling on the admissibility of Dr. Castle's report to allow more detailed consideration. (Tr.-17) This tribunal now concludes that Claimant has not made a case for exclusion of the evidence in question.

In his motion for reconsideration of Judge Jansen's initial ruling, which Judge Jansen denied, Claimant contended that the Act requires that all technicians performing any medical tests upon a miner be "duly qualified," and that the lack of federal licensing standards in the Act mandates that state standards be utilized in order to determine the meaning of "duly qualified." Claimant contended that medical testing by an unlicensed technician is inherently unreliable and of suspect integrity, and that, if Pritchard cannot be cross-examined, all medical reports and tests taken with his assistance should be stricken. He cited *Richardson v. Perales*, 402 U.S. 329 (1971), which held that the medical report of a licensed physician may be received as evidence and may constitute substantial evidence supportive of a finding when the claimant has not exercised the right of subpoena and cross-examination of the physician, thus implying that inability to cross-examine the technician required exclusion of the evidence. Judge Jansen ruled that the right to cross-examine required a continuance of the hearing until Pritchard's availability would allow that right of cross-examination to be exercised.

In his order dated February 3, 2000, which was responsive to various materials submitted by the Claimant, Judge Jansen, *sua sponte*, anticipated objections by Claimant or others to the admission into evidence of pulmonary function test and blood gas study results obtained by the allegedly unlicensed technician Pritchard as well as medical reports by Dr. Castle based upon those study results. He noted the submission by Claimant of various materials including a letter dated April 28, 1999, addressed to Claimant's counsel from the Commonwealth of Virginia, Department of Health Professions, Board of Medicine, indicating that the Board has no record of granting licensure to a Mr. Rod Pritchard as a respiratory care practitioner or an occupational therapist. Judge Jansen noted the presence of an objection by Claimant to an examination by Dr. Castle, but the absence of a motion

for court intervention in the examination process or the exclusion of evidence.

In substance, Judge Jansen ruled that in general and pursuant to the explicit general mandate of the Act, such evidence would qualify and should be received as relevant; that the quality standards contained in Appendices B and C of Part 718 apply and presume the regularity of such testing absent proof to the contrary; that the applicable quality standards make no reference to licensing requirements for technicians, so that evidence concerning such licensing standards and the status of technicians with respect thereto is not relevant to any issue involved in the case and, therefore, would be excluded, absent amendment of the pertinent regulations. Judge Jansen suggested that the medical physicians would be the proper agents to determine whether such testing conformed to the applicable regulatory standards. He also suggested that the Office of Administrative Law Judges was without authority to police state licensing requirements for medical technicians, and concluded that quality assurance could rely upon the authority of Administrative Law Judges to afford additional weight to test results and medical opinions which complied with those regulatory standards.

While denying Claimant's request for reconsideration and other relief in an order dated March 14, 2000, Judge Jansen ruled, in essence, that because the reliability and probative value of ventilatory tests and arterial blood gas study results and the quality of their technical administration are at issue in black lung proceedings, examination of an administering technician concerning his or her credentials and the application of the applicable quality standards to both kinds of studies would be relevant to the pending proceeding. However, because the technician Pritchard was apparently unavailable during a pending state investigation such that he had invoked, and, if subjected to subpoena, apparently would invoke, his Fifth Amendment privilege against self-incrimination, Judge Jansen ordered that the case be postponed until the challenged evidence be withdrawn or the technician be available to give testimony, and denied the Claimant's motion to subpoena Pritchard.

Claimant did not repeat his request for a subpoena for Pritchard after the hearing was rescheduled in due course for January 9, 2001. Neither did he request a continuance, or protest going forward with the hearing in the absence of Pritchard's testimony. In essence, he objected to the admissibility of Dr. Castle's medical evidence developed with the participation of Pritchard because he alleged simply that Pritchard was unlicensed.

With regard to Claimant's objection, this tribunal concludes that the substance of the evidentiary record is not significantly different with respect to this issue than it was before Judge Jansen. By not requesting a continuance as allowed by Judge Jansen, and by allowing the hearing to proceed, Claimant must be deemed to have waived his right to call Pritchard for cross-examination. Claimant adduced no evidence which requires this tribunal to disturb Judge Jansen's ruling in this case that state licensing requirements are irrelevant to the admissibility of otherwise relevant and competent evidence. Moreover, the record before this tribunal does not establish that this technician Pritchard was not licensed under any applicable requirement of Virginia law, or that Pritchard or any other person is in breach of any particular or pertinent licensing requirement which would require exclusion of Dr. Castle's reports, testimony, or test results, or references to them. There simply is no evidence of record which establishes that the medical services that Pritchard performed required a particular license, or, indeed, any license at all, under the laws of Virginia at the time that the

challenged services were performed. Representations and arguments of counsel and submissions lodged with the tribunal but not admitted into evidence do not constitute evidence upon which such a determination could properly be based.

The ruling in *Maggard* is not controlling, because it related to a doctor who, though licensed in another jurisdiction, was proved to have performed an examination in a jurisdiction in which he was not licensed to practice medicine. The licensing requirement in that case was clear on the basis of the evidence of record. In essence, this tribunal concludes that there is simply an insufficient record to allow the relief sought by the Claimant in regard to evidence affected by Pritchard. Claimant, as the asserting party who carries the burden of proof or persuasion, has failed to satisfy that burden in this case. The objection to the admission of the evidence, therefore, must be overruled. There is no basis in the record for assigning diminished probative weight to the evidence because of the licensing issue.

Background

Eighteen years of coal mine employment with Employer, Westmoreland Coal Company, the properly designated Responsible Operator, was stipulated in accordance with prior findings. (Tr. 18-19)

X-ray Evidence[2]

With the exception of the positive x-ray interpretation, 1/1, by Dr. Nash, who was not shown to be either a board-certified radiologist or a B-reader, all of the x-ray interpretations before Judge Rosenzweig were negative and do not need to be separately reanalyzed. (D-67-39) The most recent of those x-rays dated from August 18, 1989, and the substantial preponderance of the x-ray interpretations before her was by appropriately and well credentialed physicians. (D-26, 67-39) The x-ray evidence listed below was generated after the decision rendered by Judge Rosenzweig on June 28, 1991.

Exhibit No.	X-ray Date	Doctor	Qualifications	Film Quality	Interpretation
D-17, 18	7/12/91	Gogineni	BCR, B	1	0/0
D-17, 18	7/12/91	Cooper, Kevin R.	B	2	0/0

[2]"B" denotes that the doctor is a B-reader. "BCR" denotes that the doctor is a board-certified radiologist. 0/0 indicates a negative reading for pneumoconiosis on the ILO-W/C form even if not expressly so noted. In certain instances, where the doctor's credentials are not disclosed by the record, this tribunal has taken judicial notice of those qualifications by reference to the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org, and the List of NIOSH Approved B Readers, found, *inter alia*, at http://www/oalj.dol.gov/libbla.htm. *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990).

Exhibit No.	X-ray Date	Doctor	Qualifications	Film Quality	Interpretation
D-17	7/12/91	Hayes	BCR, B	1	0/0, COPD
D-17	7/12/91	Binns	BCR, B	2	0/0
D-27, E-2, 4	4/25/96	Wiot	BCR, B	2	0/0
D-4	11/20/96	Paranthaman	B	1	0/1 p/p
D-13, 26	11/20/96	Cole	BCR, B	none	0/0
D-17, 40	3/11/97	Dahhan	B	none	0/0
D-27, E-2, 4	3/11/97	Wiot	BCR, B	2	0/0
D-28	3/11/97	Spitz	BCA, B	1	0/0
D-28, E-4	3/11/97	Shipley	BCA, B	1	0/0
E-2, 4	11/3/97	Wiot	BCR, B	1	0/0
E-8[3]	11/3/97	Pendergrass	BCR, B	1-2	0/1 s/s
E-8	11/12/97	Pendergrass	BCR, B	1	0/1 s/s
E-2, 4	11/12/97	Wiot	BCR, B	2	0/0
D-37	11/12/97	Castle	B	2	0/0
D-38	11/12/97	Scott	BCR, B	2	0/0
D-38	11/12/97	Wheeler	BCR, B	2	0/0
D-43	11/12/97	Cole	BCR, B	1	0/1 q/s
E-10	11/12/97	Kim	BCR, B	2	0/0
Judge Murty's Decision	6/30/98				

[3]Employer's submission of Exhibit 8 under cover letter dated January 7, 2000, recited the inclusion of an x-ray reading by Dr. Pendergrass of an original x-ray film dated July 28, 1999, but the reading was not included in the exhibit as actually received and admitted into evidence.

Exhibit No.	X-ray Date	Doctor	Qualifications	Film Quality	Interpretation
D-49, 53	7/22/98	Cappiello	BCR, B	1	1/2 p/q[4]
D-58, 38	7/22/98	Wheeler	BCR, B	1	0/0
D-59, 38	7/22/98	Scott	BCR, B	1	0/0
D-66, E-2, 4	7/22/98	Wiot	BCR, B	1	0/0
E-10	7/22/98	Kim	BCR, B	1	0/0
D-58	7/22/98	Wheeler	BCR, B	1	0/0
E-8	7/22/98	Pendergrass	BCR, B		0/1 s/s
E-13	7/22/98	Gogineni	BCR, B	2	0/1 s/t
E-13	7/22/98	Abramowitz	BCR, B	1	0/1 s/t
E-8	8/17/98	Pendergrass	BCR, B	1	0/1 s/s
D-50, 53	8/17/98[5]	Westerfield	BCR, B	1	1/1 q/s
D-58, 38	8/17/98	Scott	BCR, B	1	0/0
D-58, 38	8/17/98	Wheeler	BCR, B	1	0/0
D-66, E-2, 4	8/17/98	Wiot	BCR, B	1	0/0

[4]Dr. Cappiello noted changes of chronic obstructive pulmonary disease (emphysema) in addition to pneumoconiosis.

[5]Dr. Westerfield's narrative report referred to PA and lateral chest radiographs read 1/1 q/s, obtained on 8/17/98, the date of Dr. Smiddy's report, which purports to attach a B-reader chest x-ray report of unspecified date. The attached narrative report by Dr. Westerfield describes an x-ray dated 8/17/98, but an ILO-U/C form which accompanies the attached narrative report by Dr. Westerfield identifies an x-ray date of 8/19/98. (D-50, 53) The Claims Examiner's acknowledgment of receipt of reports refers only to x-rays dated 7/22/98 and 8/19/98, but that exhibit includes Dr. Westerfield's narrative report relating to the x-rays dated 8/17/98 and the ILO-W/C form referring to the x-ray dated 8/19/98. (D-53) The Claimant's submission requesting modification refers to Dr. Cappiello's reading, and Dr. Smiddy's report, but not Dr. Westerfield's x-ray interpretations. (D-52) Apart from Dr. Westerfield, an identical group of doctors read both an 8/17/98 x-ray and an 8/19/98 x-ray. (D-58, 66; E-8, 10, 13) Dr. Dahhan, apparently mistakenly, referred to the x-ray as dated 6/19/98. (E-1)

Exhibit No.	X-ray Date	Doctor	Qualifications	Film Quality	Interpretation
E-10	8/17/98	Kim	BCR, B	1	0/0
E-13	8/17/98	Gogineni	BCR, B	1	0/0
E-10	8/19/98	Kim	BCR, B	1	0/0
E-13	8/19/98	Gogineni	BCR, B	1	0/1 s/t
D-58, 38	8/19/98	Scott	BCR, B	1	0/0
D-58, 38	8/19/98	Wheeler	BCR, B	1	0/0
D-66, E-2, 4	8/19/98	Wiot	BCR, B	1	0/0
E-8	8/19/98	Pendergrass	BCR, B	1/2	0/1 s/s
D-50, 53	8/19/98	Westerfield	BCR, B	1	1/1 q/s
E-1, 2, 4	6/28/99	Wiot	BCR, B	2	0/0
E-1, 4	6/28/99	Spitz	BCR, B	1	0/0
E-1, 4	6/28/99	Shipley	BCR, B	3	0/0
E-1	6/28/99	Dahhan	B	1	0/0
E-14	6/28/99	Wheeler	BCR, B	2	0/0
E-14	6/28/99	Scott	BCR, B	2	0/0
E-15	6/28/99	Kim	BCR, B	2	0/0

Pulmonary Function Studies[6]

Exhibit No.	Date of Test	Age/ Height	Conform	FEV-1	MVV	FVC	Coop./ Compr.	Qualify
D-26	7/27/88	61/66"	Yes	3.06	106.14	4.58	fair fair	No
D-40, 26	8/18/89	62/65"	Yes	3.32	131	4.50	Good	No
D-26	2/26/90	63/65"	Yes	3.04	95	3.98		No
D-17, 40	3/11/97	70/166cm	Yes[7]	2.90	92.07	4.56	Good	No
D-37,44	11/12/97	71/65"	Yes	2.90	79	4.15	Good	No
Judge Murty's Decision	6/30/98							
D-51	7/22/98	71/66"	Yes	2.56 2.70	58 58	3.77 3.79	good[8] good	No No
E-1	6/28/99	72/166cm.	Yes	2.59	64	3.44	good good	No

[6]The second set of listed values relates to post bronchodilator test results. Centimeters are converted to inches by a factor of 0.3937, so that 166 cm. converts to 65.4 inches.

[7]Dr. Dahhan noted that there was excessive variability between the three tracings for the FEV1's greater than 5%, but that spirometry was normal.

[8]The attached preliminary report noted the absence of significant response to bronchodilators, the presence of moderate airway obstruction, and MVV reduction more than the FEV_1, suggesting poor effort or concurrent neuromuscular disease.

Arterial Blood Gas Studies[9]

Exhibit No.	Test Date	pCO_2	pO_2	Qualify
D-40	8/18/89	40.3 39.2	70.8 80.1	No No
D-26	2/26/90	38.3	75.5	No
D-17, 40	3/11/97	32.4	59.9	Yes[10]
D-37, 44	11/12/97	33.3	133	No
Judge Murty's Decision	6/30/98			
D-55	8/17/98[11]	34.3	65	No
E-1	6/28/99	35.6	61.5	Yes

Physicians' Opinions

Dr. Prince

Dr. Prince reported a hospital admittance on February 12, 1986. He referred to Dr. Haines' x-ray, a past medical history which included pneumonia, a smoking history of fifty-five pack years and continuing, employment history of fifteen years underground coal mine employment, fifteen years. The discharge summary was dated February 17, 1986. (D-26)

Dr. Paranthaman

In his report dated July 29, 1988, Dr. Paranthaman diagnosed moderate hypoxemia at rest and during exercise, with an etiology of both cigarette smoking and coal dust exposure. He opined, "Functional impairment (due to gas exchg prob) appears to be moderate. This degree of impairment, however, is not totally disabling yet."

Dr. Dahhan

Dr. Dahhan is board-certified in internal medicine and the subspecialty of pulmonary medicine, and is a B-reader. Dr. Dahhan's report dated August 22, 1989, was based on an August 18 examination when

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[9]The second set of listed values relates to exercise test results.

[10]Dr. Dahhan noted inability to obtain post exercise sample, mild hypoxia, and hyperventilation.

[11]Dr. Ranavaya, who is board-certified in occupational medicine and is a B-reader, validated the arterial blood gas study on 2/2/99. (D-55, 56)

Claimant was sixty-two, and review of specified medical records. (D-40, 26) He concluded that, based on specified objective evidence including test results and negative x-ray, there could be no diagnosis of occupational pneumoconiosis, and that indications of nondisabling chronic bronchitis could be attributed to Claimant's smoking history. Dr. Dahhan's overall evaluation, including physical examination and review of medical records, was that Claimant had the physiological capacity from a respiratory standpoint to continue his previous coal mining employment with no evidence of pulmonary disability arising from his coal dust exposure, and no other evidence of disability.

Dr. Dahhan was deposed on May 4, 1990, following that pulmonary examination of the Claimant on August 18, 1989, described as including occupational and medical histories, a physical examination, EKG, resting and exercise arterial blood gas studies, spirometry, and chest x-ray, and review of certain medical records of the Claimant, and reflected in a written report dated August 22, 1989. (D-26) Claimant's recorded smoking history was half a pack of cigarettes per day since age twelve, assessed as a long, significant smoking history of twenty-five pack years, more than enough to cause chronic bronchitis in a susceptible individual, and sufficient to support a diagnosis by history in the absence of objective findings. (D-26 at 5-6) Physical examination disclosed no evidence of serious pulmonary dysfunction. Dr. Dahhan noted minimal hypoxia attributable to profusion mis-match, with normal values after exercise, consistent with mild obstructive defect and no restrictive defect. (D-26 at 8-9) Dr. Dahhan also questioned the technical integrity of an arterial blood gas study conducted by Dr. Paranthaman in July 1988. (D-26 at 9-10) Despite excessive variability reflected in the tracings which reflected inconsistent effort, Dr. Dahhan discerned normal values in the pulmonary function study. (D-26 at 10-11) The x-ray was normal, 0/0. Dr. Dahhan provided a reasoned opinion that Claimant does not have coal workers' pneumoconiosis or any pulmonary or respiratory disability related thereto, with citations to the various objective medical evidence upon which he relied. (D-26 at 12-13)

Dr. Dahhan examined the seventy-year old Claimant on March 11, 1997, noting in his report dated March 12, 1997, appropriate histories, including a coal mine employment history of nineteen years underground ending with retirement in 1989 as a brandish man, track man, continuous miner and long wall operator, his last job. (D-17, 26, 40; E-4) He recorded a fifty-one year smoking history of a pack a day, beginning at age nine and continuing to age sixty in 1989. In addition to the physical examination, Dr. Dahhan took an x-ray, interpreted as 0/0, and performed pulmonary function and arterial blood gas studies, an electrocardiogram, and reviewed specified medical records. Citing particular objective medical evidence, Dr. Dahhan found no basis for a diagnosis of coal workers' pneumoconiosis, no abnormalities in the pulmonary function studies except mild hypoxia, which he attributed to Claimant's thirty to forty pack years of smoking, and functional respiratory capacity to continue his last coal mine or comparable work.

Dr. Dahhan was subsequently deposed on January 19, 1998, having reviewed recent reports by Dr. Castle, Dr. Fino, and Dr. Morgan, and several x-ray interpretations by Drs. Binns, Gogineni, and Hayes. (D-40) He also testified regarding his examination of the Claimant in 1997, which had disclosed no abnormalities of the respiratory system and that Claimant was no longer a smoker. Dr. Dahhan confirmed that the chest x-ray taken at the time was negative for pneumoconiosis, spirometry showed no respiratory impairment, though there was a possibility of small airway disease, and reduced diffusion capacity that was lower than the normal values obtained by Dr. Castle. The arterial blood gas test results disclosed mild hypoxemia with hyperventilation, slightly below normal pO_2 deterioration for Claimant's age of seventy, and oximetry indicated no reduction with exercise. Resting hypoxemia noted by Dr. Dahhan and Dr. Castle was attributed by Dr. Dahhan to small airway disease attributable to smoking and causing ventilation profusion mismatch, or alteration in the exchange of air and blood. He opined that the hypoxemia might also be attributable to heart disease. But he opined, based on the data from his own and Dr. Castle's examinations, that Claimant does not

have coal workers' pneumoconiosis and strictly from a respiratory standpoint, he has the capacity to perform his last usual coal mining job.

Dr. Dahhan examined Claimant on June 28, 1999. His report is dated July 1, 1999. (E-1) He recorded a medical history, and underground coal mine employment of nineteen years ending with retirement in 1989. Claimant worked as a braddish man, track man, and long wall operator. Dr. Dahhan noted a smoking history of a quarter pack per day beginning at age twelve and ending in 1991, when Claimant would have been sixty-four. Examination disclosed good air entry to both lungs with no crepitation or wheeze; no clubbing or edema of extremities. The examination included arterial blood gas and pulmonary function studies, EKG, and x-ray, which he read as 0/0. The pulmonary function studies indicated normal respiratory mechanics with no evidence of restrictive or obstructive abnormalities. Dr. Dahhan also reviewed specified medical records He concluded, "based on my examination of this patient in the past, my review of his medical records on previous occasions, my examination of him again in 1999, and my review of the presently submitted medical records," that diagnosis of coal workers' pneumoconiosis could not be justified because of the normal clinical examination of the chest, normal respiratory mechanics including spirometry, lung volumes and diffusion capacity, as well as clear chest x-ray. He attributed variable changes in Claimant's blood gas exchange mechanisms or hypoxemia to Claimant's peripheral atherosclerosis, hypertension, and hyperlipidemia, which are unrelated to coal dust exposure, and not his essentially normal respiratory system.

Dr. Dahhan was deposed by Employer for the third time on December 3, 1999, following his third examination of the seventy-two year old Claimant in June 1999. (E-7 at 9-11) He had reviewed additional medical evidence supplied by the Employer, which included transcript of a deposition of Dr. Castle, and reports by Dr. Fino, Dr. Castle, and Dr. Morgan based on reviews of medical data, and certain x-ray interpretations by Drs. Wiot, Spitz, and Mullins. (E-7 at 10, 17) He reiterated his findings of normal respiratory mechanics, and neither restrictive nor obstructive lung disease based on spirometry studies, and resting hypoxia with adequate ventilation based on a resting arterial blood gas test, and probably attributable to Claimant's moderate obesity, and possibly his peripheral atherosclerosis, hypertension, and hyperlipodemia, and ventilation profusion mismatch. (E-7 at 13-15) Dr. Dahhan found no x-ray evidence of pneumoconiosis. (E-7 at 16) He opined that Claimant was disabled, but that the hypoxemia was from nonpulmonary causes, and that Claimant has no impairment or disability affected by coal mine dust exposure. (E-7 at 19)

Dr. Dahhan's report dated February 22, 2000, based on his review of specified records included review of his prior reports, the earliest from 1989, and his deposition in 1990, and recent reports of various physicians dating from 1999 and 2000, as well as more recent chest x-ray readings, concluded, essentially as he had before and on a reasoned basis, that Claimant does not have pneumoconiosis, or any pulmonary impairment or disability, that he could continue his previous coal mine employment from a respiratory standpoint, and that his multiple medical problems are unrelated to inhalation of coal dust or coal workers' pneumoconiosis. (E-12)

Dr. Miller

Dr. Miller recorded the results of his examination of the Claimant on February 26, 1990, as an evaluating physician for the Kentucky Workers' Compensation Board in a report dated March 19, 1990. (D-26) He noted eighteen years coal mine employment, a smoking history of a half a pack of cigarettes per day for forty years, mild dyspnea and wheezes on exertion, no medications, no pertinent medical problems, and a height of 65". He interpreted an x-ray, 0/1, performed ventilatory and arterial blood gas studies, and diagnosed mild hypoxia, mild chronic bronchitis, and concluded that Claimant had no occupational lung disease caused by coal mine employment and that he could do his usual coal mine work.

Dr. Castle

Dr. Castle, who is board-certified in internal medicine, and the subspecialty of pulmonary diseases, and is a B-reader, provided an opinion dated November 28, 1997, based upon a pulmonary evaluation performed on November 128, 1997. The evaluation included appropriate histories, a physical examination, a chest x-ray, pulmonary function and arterial blood gas studies, and an EKG. (D-37, 44; E-3, 6) He recorded a smoking history of at least twenty pack years beginning at age seven and stopped in 1991; also underground coal mine employment of nineteen years ending in 1989, working the long wall as a head gate the last two years, with some heavy labor involved. He recorded valid, essentially normal, pulmonary function studies which disclosed neither significant obstruction nor restriction, and normal volumes. Resting arterial blood gas studies disclosed mild hypoxemia.

Dr. Castle found no evidence from his examination data of coal workers' pneumoconiosis or respiratory impairment, but noted vascular disease, a history consistent with bronchial asthma, and mild hypoxemia related to Claimant's obesity. Dr. Castle also reviewed specified data related to the claim, concluding that Claimant does not suffer from coal workers' pneumoconiosis, despite adequate exposure if he were susceptible. He also opined that Claimant's smoking history was sufficient to have caused chronic obstructive pulmonary disease such as chronic bronchitis, emphysema, or lung cancer, as well as peripheral vascular disease. He found no indicia of clinically significant interstitial pulmonary process or other typical indications of pneumoconiosis or other pulmonary abnormality from x-rays or otherwise. Dr. Castle suggested likely disability attributable to atherosclerotic peripheral vascular disease unrelated to coal mining employment.

At his deposition on May 15, 1998, Dr. Castle had reviewed additional specified data, and reiterated and explained his prior conclusions in greater detail that Claimant has an essentially normal respiratory function, without evidence of coal workers' pneumoconiosis of any kind, and with the respiratory capacity to do his last coal mine job as described. He opined that the mild hypoxemia noted is attributable to obesity and not to pulmonary causes. He would be disabled, however, by atherosclerotic heart disease, and probably by age and obesity. (D-37 at 10, 28-30)

Dr. Castle provided a report dated November 10, 1999, based on a review of specified medical data, including his own 1997 examination report, the 1999 report of Dr. Dahhan, and the 1998 report of Dr. Smiddy. (E-3, 6) Based on the reviewed medical data, including an assessment of a twenty to thirty pack-year smoking history, he opined that Claimant does not suffer from coal workers' pneumoconiosis, or have any indications of an interstitial pulmonary process, or obstruction, restriction, or diffusion abnormality; that Claimant's resting hypoxemia is attributable to his obesity, not underlying lung disease or coal dust exposure; and that he retains the respiratory capacity to return to his previous coal mine employment. Claimant's disability is attributable to unrelated causes.

In a second deposition on November 15, 1999, Dr. Castle elaborated upon his professional background and his conclusions, and reiterated his opinion that Claimant has neither medical nor legal pneumoconiosis, and has no pulmonary limitations to performance of any mining job for which he has received training, with which Dr. Castle professed familiarity, although he is probably disabled by obesity, age, and peripheral vascular disease, unrelated to his coal mining employmentor coal dust. (E-6 at 18-19, 25, 37-39) Dr. Castle disagreed in detail with Dr. Smiddy's interpretation of a pulmonary function study which Dr. Castle considered invalid, but in no event indicative of moderate obstruction, and Dr. Smiddy's conclusions which he considered to be unfounded on objective medical evidence. (E-6 at 31-32, 34-35) Dr. Castle also opined that Claimant was not susceptible to the injuries of tobacco smoke, despite a fifteen pack year smoking history extended over sixty

years, or coal mine dust, and that obesity was the cause of his resting hypoxemia. (E-6 at 18-19, 29) Dr. Castle opined that the valid pulmonary function studies of record showed normal spirometry, including, exceptionally, normal MVV at 100 percent of predicted, and essentially normal diffusing capacity. (E-6 at 21) He also found no x-ray evidence of coal workers' pneumoconiosis, and articulated amazement at Dr. Cappiello's positive x-ray interpretations. (E-6 at 13-14)

Dr. Castle's report dated February 25, 2000 was based upon a review of specified medical data including his own prior report from 1997, his depositions taken in 1998, 1999, and 2000, Dr. Wiot's and Dr. Dahhan's 1999 depositions, the 1999 reports of Drs. Zaldivar, Fino, the 2000 report of Dr. Fino, Dr. Pendergrass's and Dr. Kim's x-ray interpretations of 1997 and 1998 films. (E-12) Dr. Castle reiterated his prior conclusions as unchanged by the additional medical data. He opined that Claimant had sufficient exposure to have developed coal workers' pneumoconiosis, but had not, and that his mild hypoxemia was associated with his obesity, although he might be disabled by his age and other medical problems unrelated to coal mine employment and coal dust exposure.

Dr. Zaldivar

In a report dated March 23, 1998, Dr. Zaldivar, who is board certified in internal medicine, pulmonary diseases, sleep disorder, and critical care medicine, and is a B-reader, reviewed specified medical records at Employer's request. (D-39) He opined that a mild airway obstruction was the result of mild emphysema caused by lifelong smoking; that mild resting hypoxemia was without clinical significance, and that Claimant could perform all work for which he had been trained. He responded to questions indicating that there was insufficient evidence to diagnose coal workers' pneumoconiosis; there is a pulmonary impairment, resting hypoxemia caused by emphysema and obesity, which is very mild caused by Claimant's smoking; he is not totally or permanently disabled. He made no reference to the disabling vascular disease to which Dr. Castle referred.

Dr. Zaldivar also provided a report dated November 9, 1999, based upon a review of additional specified records pertaining to the Claimant. (E-5) The records included his own prior reports from 1990 and 1998, the reports of Dr. Smiddy and Dr. Dahhan, various x-ray interpretations and pulmonary function and arterial blood gas test results as specified. He opined that there was no evidence of coal workers' pneumoconiosis, there was a record of poor cooperation with breathing tests, but normal ventilatory studies when performance was somewhat adequate. He opined that Claimant has peripheral vascular disease and possibly cardiac disease, but no pulmonary impairment whatsoever, or any dust related disease of the lungs. Thus, Dr. Zaldivar opined that Claimant is capable of performing his usual coal mine work and arduous manual labor from a pulmonary standpoint.

A report dated February 23, 2000, reflected Dr. Zaldivar's review of specified additional records supplied by Employer's counsel. Dr. Zaldivar noted that this was his fourth such review, in addition to review of pertinent x-rays. (E-12) The review was almost entirely of the 1999 and 2000 reports of physicians, and included certain additional, more recent x-ray interpretations, and resulted in a reiteration of his prior conclusions.

Dr. Morgan

Dr. Morgan, who apparently is a pulmonary specialist, but without board-certification, though he described by Dr. Castle as a world-known authority in occupational lung disease and coeditor of a respected

text in that field, and is a B-reader, provided a report to Employer dated December 29, 1997, based upon a detailed review of specified medical data. (D-42; E-4, 6 at 11) He opined that there was insufficient radiographic or other evidence to justify a diagnosis of coal workers' pneumoconiosis, but that there was minimal obstructive and restrictive impairment and probably a minimal reduction of diffusing capacity. Dr. Morgan indicated that Claimant has several other unspecified problems that might cause some disability, but opined that his respiratory impairment is not totally and permanently disabling and would not preclude his regular coal mine work, which might, however, be precluded by his age.

Dr. Morgan provided a second opinion dated October 24, 1999, based on a review of specified medical records, most of which reflected pulmonary function and arterial blood gas test results. (E-2) Dr. Morgan questioned the quality of Claimant's effort related to the pulmonary function tests and the veracity of Claimant's varied estimates of his smoking history given to the doctors. Based on a detailed and reasoned analysis of the reviewed evidence, Dr. Morgan concluded that Claimant has a mild, nondisabling airways obstruction caused by his cigarette smoking. He opined that there was no radiographic evidence of coal workers' pneumoconiosis based on negative x-ray interpretations and the likelihood that Claimant's nineteen years in the mines even at the long wall would have involved relatively small coal dust exposure because of protective Federal coal mine legislation. Dr. Morgan opined, however, that the Claimant was probably totally disabled on account of his age, and other specified medical problems which were not related to his coal mine work.

Dr. Morgan's report dated February 19, 2000, reviewed specified records of relatively recent origin including his two prior reports, and he made favorable assessments of several of the opining physicians who were specially known to him. He found no cause to change his previous opinions. (E-12)

Dr. Fino

Dr. Fino, who is board-certified in internal medicine and the subspecialty of pulmonary disease, and a B-reader, reviewed specified medical records for a third time, as reflected in a report dated January 5, 1998, to Employer, which confirmed his prior assessments of Claimant's medical condition. (D-41, 26) He had previously provided reports dated October 23, 1989, based upon a review of specified medical records, and November 10, 1997. Those reports reflected his opinion that there was insufficient evidence to justify a diagnosis of simple coal workers' pneumoconiosis, or to establish a respiratory impairment or disability. (D-26) He noted recent development of a resting, but nonimpairing, nondisabling, resting hypoxia, unrelated to the inhalation of coal mine dust. He declared specified normal pulmonary function test values inconsistent with obstruction or restriction and normal diffusing capacity as indicative of no oxygen transfer impairment. He explained a ventilation perfusion mismatch and resulting reversible hypoxia in the absence of other indicia as attributable to weight gain and advancing age. Thus, he found no coal workers' pneumoconiosis, no occupationally acquired pulmonary condition; no respiratory impairment; and no partial or total respiratory disability precluding a return to Claimant's last coal mine job or exertional equivalent.

A report by Dr. Fino dated November 11, 1999, reflected his review of additional specified medical information, including multiple x-rays, pulmonary function and arterial blood gas study results, the 1998 report of Dr. Smiddy, and the 1999 report of Dr. Dahhan. (E-5) Noting that the majority of chest x-ray readings, as well as his own such readings, were negative for pneumoconiosis, that the acceptable spirometric evaluations were normal with no obstruction, restriction, or ventilatory impairment, that normal MVV meant no obstructive or restrictive ventilatory impairment, that the normal diffusing capacity values ruled out significant pulmonary fibrosis, and that normal lung volumes indicated the absence of abnormal under- or over-inflation. Thus, Dr.

Fino opined that Claimant's pulmonary system was normal, and that he retained respiratory capacity to perform his last coal mine employment, including sustained heavy labor. He opined that the resting hypoxia was reversible, and probably attributable to Claimant's obesity, or to subradiographic scarring from past pneumonia. He concluded that there was no evidence of simple coal workers' pneumoconiosis or occupationally acquired pulmonary condition, no respiratory impairment or disability.

A report by Dr. Fino dated January 18, 2000, reflected a fourth review of medical records and x-ray interpretations, and Dr. Fino's opinion that there is insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis or finding of respiratory impairment or pulmonary disability. His review of the additional evidence as specified, as well as evidence reviewed earlier, which was identified in his report, engendered no change in his opinion or findings, and he reiterated his opinion that Claimant does not suffer from an occupationally acquired pulmonary condition as a result of coal mine dust exposure. (E-9) His report included a discourse with cited authorities on the requirements for testing and physician qualifications for reliable assessment of occupational pulmonary disease and related impairments, which followed his identification of the evidence reviewed. It suggested that, because clinical testing is critical to such assessments, an examining or treating physician has little or no advantage over a physician with specialist's qualification limited to the review of medical records of a particular patient. He concluded, based on his review, that Claimant's pulmonary system is normal and he retains the physiologic capacity from a respiratory standpoint to perform all of the requirements of his last job.

Dr. Smiddy

Dr. Smiddy, who is board-certified in internal medicine and board-eligible in the subspecialty of pulmonary disease, examined Claimant on August 17, 1998, noting appropriate histories, including smoking history of unspecified amount ending eight years prior, and coal mine employment of nineteen years underground as a miner's helper and on the long wall with heavy exposure to coal dust and some exposure to rock dust. (D-50) Chest examination disclosed decreased breath sounds, but there was no clubbing. Dr. Smiddy noted that provided records of a July 22, 1998, pulmonary function studies indicated a moderate obstructive process. A current arterial blood gas study produced pO_2, 65, pCO_2, 34. Dr. Smiddy opined that Claimant has a major degree of pneumoconiosis, sufficient to be totally and permanently disabling, with associated chronic bronchitis and COPD, as well as other problems. Records of objective testing, except for the x-ray report, positive for pneumoconiosis, classification 1/1 q/s, and the resting blood gas study, were not attached, and Dr. Smiddy did not explain the basis for the conclusory opinion.

Dr. Wiot

Dr. Wiot was deposed on November 1, 1999. (E-2) After testifying regarding his background, experience, and credentials, he identified the x-rays which he had interpreted and opined that the Claimant had no evidence of coal workers' pneumoconiosis or any abnormality related to coal dust exposure on any of the x-rays which spanned a period of ten years from June 1989 to June 1999. He also opined that there was essentially no chance that Claimant would have developed coal workers' pneumoconiosis after having last worked as a coal mine in 1989, ten years prior to the last x-ray Dr. Wiot interpreted. (E-2 at 23-24)

Dr. Spagnolo

Dr. Spagnolo, who is board-certified in internal medicine and pulmonary diseases, submitted a report dated February 22, 2000, based on his review of specified medical data. The report recorded his reasoned

opinion that Claimant does not have coal workers' pneumoconiosis, or a pulmonary/respiratory impairment attributable to a pneumoconiosis, and that neither coal dust exposure nor coal workers' pneumoconiosis have contributed to his current medical condition(s). (E-11) Dr. Spagnolo based his opinion upon the multiple physical examinations by Drs. Prince, Paranthaman, Dahhan, and Castle which he opined did not disclose interstitial lung disease manifested by diffuse crackles during the physical examination, dullness to percussion or significant finger clubbing; upon the multiple negative chest x-ray interpretations over a thirteen year period from 1986-99; and upon the results from lung function testing, which reflected stability and normality from 1988-99. He attributed the slight decrease in arterial PaO_2 to weight gain, which he explained can lead to misleading values with insufficient inspiratory efforts, and one of Claimant's medications. He also suggested that Dr. Dahhan's assessment of minimal hypoxia would be attributable to failure by Dr. Dahhan to consider the effect of barometric pressure testing which would have reconciled the result as normal for Claimant's age. Dr. Spagnolo also based his negative conclusion regarding pneumoconiosis on the negative chest x-ray readings, especially those by Drs. Shipley, Spitz, Kim, and Wiot, and the consistent negative conclusions of Drs. Morgan, Zaldivar, Fino, Dahhan, and Castle, as reflected in their several medical reviews. He discounted Dr. Smiddy's analysis because Dr. Smiddy did not provide an analysis of Claimant's numerous lung function tests, did not assess Claimant's smoking history, and provided no analysis of the effect that smoking, obesity, vascular disease, or medications would have had on Claimant's blood gas values.

Conclusions of Law and Discussion

Benefits under the Act are awardable to persons who are totally disabled due to pneumoconiosis within the meaning of the Act. For the purpose of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung, and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Section 718.201. In order to obtain federal black lung benefits, a claimant must prove by a preponderance of the evidence that: "(1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4) pneumoconiosis is a contributing cause to his total respiratory disability." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 529, 21 BLR 2-323 (4th Cir. 1998); *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 BLR 2-304 (4th Cir. 1995); 20 CFR §§718.201-.204 (1999); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986).

Modification: Change in Conditions or Mistake of Fact

Claimant's request for modification is governed by§725.310, which provides that any party may request modification of an award or denial of benefits if such request is filed within one year of the denial alleging a change in conditions or mistake in a determination of fact. Where mistake of fact forms the grounds for the modification request, new evidence is not a prerequisite, and a mistake of fact may be corrected whether demonstrated by new evidence, cumulative evidence, or further reflection on evidence initially submitted. *Kovac v. BCNR Mining Corporation*, 16 BLR 1071 (1992), *modifying* 14 BLR 1-156 (1990). If no specific mistake is alleged, but the ultimate determination of entitlement is challenged, the entire record must be examined for a mistake in a determination of fact. *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). The administrative law judge, as trier-of-fact, has the authority, and the duty, to review the record evidence *de novo* and is bound to consider the entirety of the evidentiary record, and not merely the newly submitted evidence, in making a finding pursuant to a request for modification of mistake in a

determination of fact. *See Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *see also Jessee*, 5 F.3d at 725, 18 BLR at 2-28; *see generally, O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

Change in conditions as an alternate ground for modification focuses on whether there has been a worsening of the miner's pulmonary disease to the point that it is totally disabling. In determining whether a change in conditions has occurred, an Administrative Law Judge must "perform an independent assessment of the newly submitted evidence, in conjunction with evidence previously submitted, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision." *See Nataloni v. Director. OWCP*, 17 BLR 1-82, 1-84 (1993); *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994; *Napier v. Director, OWCP*, 17 BLR 1-111 (1993).

Subsequent or Duplicate Claim

A claim filed more than one year after the denial of a claimant's previous claim, is considered a duplicate or subsequent claim under the Act and regulations. §725.309. Under the pre-amended regulations, which apply to this case pursuant to §725.2(c), a subsequent claim must be denied on the grounds of the prior denial unless the claimant demonstrates that there has been a material change in conditions. §725.309(d) (pre-amended). To prove a material change of conditions, a claimant must prove, under all of the favorable and unfavorable probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP*, [Rutter], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc)*. Claimant's original claim was denied on grounds that he had failed to establish the existence of pneumoconiosis. Therefore, in order to demonstrate a material change in conditions Claimant must, as a matter of law, prove that element.

Existence of Pneumoconiosis

Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§ 718.304, 718.305, 718.306; or (4) the finding by a physician of pneumoconiosis as defined in § 718.201 which is based upon objective evidence and a reasoned medical opinion. The record contains no evidence of a biopsy, and the presumptions under §§ 718.304, 718.305, and 718.306 are inapposite, because there is no evidence of complicated pneumoconiosis, the claim was filed after 1981, and because the miner is living.

The existence of pneumoconiosis requires consideration of "all relevant evidence" under §718.202(a), as specified in the Act. Thus, if a record contains both relevant x-ray interpretations and biopsy reports, the Act would prohibit a determination based on x-ray alone, or without evaluation of physicians' opinions that the miner suffered from "legal" pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162, 2000 WL 524798 (4th Cir. 2000). Additionally, §718.104(d) provides that, in weighing the medical evidence relevant to whether the miner suffers from pneumoconiosis, the adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.

In concluding that Claimant had not proved the existence of pneumoconiosis, Judge Rosenzweig determined that the reasoned opinions before her of the best qualified physicians were uniformly and credibly negative with respect to the existence of pneumoconiosis. She found that the negative opinions of Drs. Dahhan, Fino, and Zaldivar were supported by the negative opinions of Drs. Prince, Paranthaman, and Miller. She essentially discredited Dr. Nash's opinion that diagnosed coal workers' pneumoconiosis and chronic bronchitis as unreasoned, inconsistent with objective test results, and dependent upon a misplaced reliance upon his positive x-ray interpretation. She also noted the doctor's lack of specialized credentials. (D-67-39) Thus she found that the opinions of the best qualified physicians did not establish the existence of pneumoconiosis, and no mistake of fact is discernable in her assessment of the whole of the evidence before her.

Judge Murty determined that there had been no material change in conditions since Judge Rosenzweig's decision issued June 28, 1991. The request for modification before this tribunal looks to whether there has been a change of conditions since Judge Murty's decision issued on June 30, 1998, or whether a review of the entire record establishes that there has been a mistake in a determination of fact with respect to the claim. Judge Murty's conclusion that, because Claimant had not proved the existence of pneumoconiosis, there had been no material change in conditions was based upon a conclusion that the relevant x-ray interpretations were overwhelmingly negative, and that one equivocal medical opinion and five unequivocally negative opinions by appropriately qualified physicians likewise did not prove the existence of coal workers' pneumoconiosis. An examination of the record before Judge Murty discloses no mistake in a determination of fact with respect to his conclusions. The evidence which has been submitted subsequently does not change the conclusion that Claimant has not established the existence of pneumoconiosis.

Claimant did not testify at the hearing before this tribunal on January 9, 2001. He relied on three evidentiary exhibits to support his request for modification: a positive chest x-ray interpretation, 1/2 p/q, by

Dr. Cappiello of a film dated September 28, 1998 [sic][12]; a pulmonary evaluation by Dr. Smiddy dated August 17, 1998; and results of pulmonary function tests administered on July 22, 1998. (D-49, 52, 53,) However, except for Dr. Westerfield's positive readings of the August 17 and August 19, 1998, films, Dr. Cappiello's positive reading stands alone among the twenty-four readings of four x-rays taken after Judge Murty's denial of June 30, 1998. Since all of those readings, except Dr. Dahhan's reading of the June 28, 1999, x-ray film, were by dually qualified board-certified radiologists who were B-readers, the x-ray evidence remains overwhelmingly negative for coal workers' pneumoconiosis. Dr. Dahhan was the only B-reader without dual qualifications, but his reading was also negative. The several readings of 0/1 by various dually qualified readers do not constitute evidence of pneumoconiosis under the applicable regulations. §718.201(b)

The pulmonary evaluation by Dr. Smiddy dated August 17, 1998, which concluded that Claimant has a major degree of pneumoconiosis, sufficient to be totally and permanently disabling, was not supported by objective evidence except for Dr. Westerfield's positive x-ray readings, which are discredited by the overwhelming quantity of evidence of record to the contrary, and the resting blood gas study, which was discredited as an indicator of impairment caused by coal mine dust exposure or coal workers' pneumoconiosis by several well qualified pulmonary specialists. Dr Castle specifically disagreed with Dr. Smiddy's interpretation of a pulmonary function study which Dr. Castle considered invalid, and not indicative of moderate obstruction as Dr. Smiddy had suggested in his August 17, 1998, report. Dr. Castle declared that Dr. Smiddy's conclusions were not founded on objective medical evidence. All of the other opinion evidence which has been generated subsequent to Judge Murty's denial on June 30, 1998, continues credibly to disprove the existence of coal workers' pneumoconiosis or impairment or disability caused by coal mine work or coal mine dust exposure. Dr. Dahhan's examination report of July 1, 1999, deposition testimony given on December 3, 1999, and report dated February 22, 2000, based on his review of specified records, disclosed a detailed and reasoned analysis to that effect, concluding that Claimant has an essentially normal respiratory system. Dr. Castle's reports dated November 10, 1999, and February 25, 2000, based on reviews of specified medical data, and his deposition testimony given on November 15, 1999, likewise provided detailed and reasoned analysis of the medical data before him and a conclusion that, despite sufficient exposure, Claimant had not developed pneumoconiosis or disability related to coal mine employment or coal dust exposure.[13]

Dr. Zaldivar's reports dated November 9, 1999, and February 23, 2000, based on review of specified medical records, including Dr. Smiddy's report, reflect the reasoned conclusion that Claimant has no evidence of coal workers' pneumoconiosis and no pulmonary impairment whatsoever. Dr. Morgan's opinions contained in reports dated October 24, 1999, and February 19, 2000, noted the absence of radiographic evidence of coal workers' pneumoconiosis and the likelihood of relatively small coal dust exposure because of protective Federal coal mine legislation. He also noted the existence of a mild, nondisabling airways obstruction caused by a lengthy history of cigarette smoking. Dr. Fino's November 11, 1999, and January 18, 2000, reports based on

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[12]The actual film date is July 22, 1998, and the reading date is September 28, 1998, as is clear from the narrative report and ILO-U/C Classification form in evidence. (D-53)

[13]Because Dr. Castle's opinion is generally consistent in its conclusions with the opinions of several other comparably qualified physicians, it might be deemed to be cumulative were it held to be tainted by the pulmonary function studies and arterial blood gas studies performed by the technician Roderick Pritchard.

review of specified medical records recorded his detailed and reasoned opinion that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis or a finding of respiratory impairment or pulmonary disability. Dr. Wiot's deposition testimony of November 1, 1999, corroborated the conclusion that Claimant has no evidence of coal workers' pneumoconiosis or any abnormality related to coal dust exposure in a ten year span of x-rays from 1989 to 1999. Dr. Spagnolo's detailed and reasoned opinion contained in a report dated February 22, 2000, was based on a review of specified medical data, and also concluded that Claimant has neither coal workers' pneumoconiosis nor a pulmonary or respiratory impairment attributable to a pneumoconiosis. He added that neither coal dust exposure nor coal workers' pneumoconiosis had contributed to Claimant's current medical condition. He considered Dr. Smiddy's analysis defective because of its failure to assess smoking history or the effects of smoking, obesity, vascular disease, or medications on Claimant's blood gas values.

Thus, there is no credible reasoned opinion by a physician that tends to establish the existence of coal workers' pneumoconiosis, or a significant respiratory or pulmonary impairment. Drs. Dahhan, Castle, Zaldivar, Fino and Spagnolo are board-certified pulmonary specialists, whose opinions are properly assigned particular probative weight. Dr. Smiddy is a board-eligible pulmonary specialist, but the lack of analysis underlying his opinion, especially in relation to objective medical evidence, renders it unpersuasive. These several opinions effectively eliminate the qualifying resting arterial blood gas study indicating the presence of hypoxemia on June 28, 1999, as the product of coal workers' pneumoconiosis or a pulmonary or respiratory condition caused by coal mine work or exposure to coal mine dust. To the extent that this test result might be deemed to reflect a changed condition, the foregoing comprehensive analysis of the evidence of record may be deemed a conclusion on the merits that Claimant has not established the existence of pneumoconiosis or total disability caused thereby. Thus, the evidence generated after Judge Murty's denial of benefits does not establish a subsequent change of conditions or a mistake of fact when that evidence is considered in relation to the evidence before Judge Murty or on the record as a whole. Therefore, there is no basis for a modification of the prior denial or an award of black lung benefits on the record before this tribunal.

ORDER

The Claimant's request for modification of the prior denial of his refiled or subsequent claim for black lung benefits is denied.

A

EDWARD TERHUNE MILLER
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the **Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of this notice must also be served on Donald S. Shire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.